

Physicians can take legal measures to protect themselves against physical threats, harassment

Karen Capen

Résumé : Les médecins peuvent prendre des mesures légales pour se protéger contre les menaces physiques et le harcèlement. Les gouvernements provinciaux et fédéral ont pris plusieurs initiatives qui peuvent donner aux médecins des moyens plus efficaces d'assurer leur sécurité personnelle en cas de piquetage, de harcèlement criminel ou de traquage, de harcèlement sexuel ou de comportement violent de la part de patients.

In the practice of medicine, workplace hazards and occupational-safety problems are usually considered hospital-management and public-health issues. However, events such as the 1992 firebombing of a Toronto abortion clinic and the 1993 murder of a Florida physician who performed abortions indicate there are other serious dimensions to the problem.

Potential threats to the personal safety and well-being of physicians and other health care providers can arise in many different situations. Doctors who may be at risk include

those who provide abortion services or perform medical review board functions, such as attending workers' compensation hearings. Physicians who work in a medical practice in which aggressive, potentially violent patients are regularly seen may be at increased risk. And in certain areas of practice, such as emergency room work, sexual harassment of female physicians by patients is considered a widespread professional problem.

Fortunately, doctors can take legal measures to protect themselves against physical threats and harassment, and recent initiatives by both provincial and federal governments may provide them with more effective means of ensuring their personal safety.

In January 1994, the Ontario government went to court to seek a temporary injunction to stop pickets and other demonstrators from moving within 150 m of abortion clinics, hospitals and doctors' homes in centres such as Toronto, London, North Bay, Brantford and Kingston. Citing vandalism, chemical attacks, blockades and verbal harassment by anti-abortion protestors, counsel for Ontario's attorney general told the court that several Ontario doctors have decided to retire or stop performing abortions because harassment had become an overwhelming problem.

The Crown reported that one doctor in Peterborough is afraid to leave her car in the hospital parking lot because she fears for her safety; another physician complained that during one of the regular Saturday demonstrations at the foot of his driveway, protesters told his school-age son that his father "kills babies."

The attorney general says the activities of these demonstrators, both at hospitals and physicians' homes, constitute a "public nuisance" and violate the right to security of the person guaranteed by the Canadian Charter of Rights and Freedoms. The Crown argues that such violations are tantamount to criminal harassment, and therefore must be restrained. The Ontario government has taken an umbrella approach in this controversial court case, and is acting on behalf of all affected physicians; as of mid-March, the court had not handed down its decision.

Any physician who has been prevented from professional practice by such demonstrations may seek an injunction. However, this is an expensive and time-consuming process for one person to pursue because a permanent injunction can only be obtained after a trial. To win an interlocutory injunction to restrain picketing or demonstrating during the legal proceeding — it is ordered

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pending the outcome of the litigation — the court must be convinced that there is a serious question to be heard, that continuation of the activity will cause irreparable harm and that the balancing of interests favours the provision of the health care services that are at issue.

These criteria could probably be met if the civil suit includes claims of injury to reputation, enjoyment of property and income-related problems as evidence of the serious nature of the problem. The doctor would also have to show that if picketing continued during the proceedings, the injury suffered by the physician could not be compensated by monetary damages. Finally, it would have to be established that the right to practise medicine according to the law is in the community's interest and in the interest of good health care, and outweighs the right of any person to protest such practices.

In a 1989 Ontario case, *Assad et al v. Cambridge Right to Life*, the Court found that the words on the signs used by pickets — "Dr. . . . kills unborn babies" — were sufficient to support an interlocutory injunction because there was an apparent defamation, the continuation of which would cause irreparable harm to the professional reputations of the doctors involved.

A federal amendment to the Criminal Code that took effect in August 1993 made criminal harassment a new offence, with a maximum penalty of 5 years' imprisonment. Stalking has received increasing media scrutiny because of attacks on women by men they had been involved with, and from whom they are now trying to flee. The new antistalking provision allows criminal prosecution when anyone repeatedly communicates with or follows another person, or someone close to that person, and as a result that person "reasonably fears" for his or her personal safety.

Doctors should be aware of this provision because it will also protect a doctor who becomes the target of such behaviour or activity; this could

include physicians who are threatened with physical harm by patients angered by medical reports they have given to compensation boards or vehicle-licensing authorities. A British Columbia physician who advises a review panel recently received threats that resulted in charges under the new antistalking legislation.

Section 264(2) of the Criminal Code says harassment includes persistent following, extended periods spent watching a person's home or workplace, harassing telephone calls, contacts with neighbours or coworkers, and contacts and possible threats against a companion, child or spouse.

The key to successful prosecution is establishing that the accused knew that the victim was being harassed. Any physician who is threatened in any of the ways described in the Criminal Code should ask a lawyer to notify the harasser that his or her actions are threatening, or tell the harasser in person, with witnesses present. This is to conform to the requirement that the harasser *knows* the actions are threatening to the physician.

Physicians may also be at personal risk if they are involved in treating patients who are unusually aggressive and potentially violent. Factors that affect the potential for violence include alcohol or drug intoxication, the availability of weapons, or a past history of violent behaviour that stems from problems such as psychosis, particularly paranoid delusions, or borderline or antisocial personality disorders.

If a patient who is known to be violent admits to carrying a weapon, hospital security personnel and police should be notified. If the patient volunteers to turn over the weapon to any health care provider, it should not be accepted directly — instead, the patient should be asked to place it on the floor or a table so that it can be removed by authorities.

If a patient is violent, the safety of that patient and others who may be at risk must take precedence over

any legal requirement of consent. The mental health act of each jurisdiction provides for emergency certification for psychiatric assessment.

Sexual harassment is another problem affecting the physical and emotional well-being of physicians. In a survey of Ontario female physicians published in the *New England Journal of Medicine* (329: 1936-1939), 77% of respondents said they had been sexually harassed by patients; stalking or verbal abuse were also common. Nearly one-third of respondents said patients had made lewd gestures and exposed themselves in suggestive ways.

It is important that physicians understand what their provincial human rights codes state concerning the meaning of sexual harassment in the workplace. (Ontario's Human Rights Code defines it as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.")

If a doctor is being sexually harassed by a patient, it is important to maintain detailed records documenting any incident or suggestion of the harassing behaviour that has been witnessed by the physician or staff. If sexual harassment is experienced, the physician-patient relationship may be terminated in accordance with guidelines provided by licensing bodies.

In general, physicians should familiarize themselves with these new developments in the law. In order to prosecute successfully under the criminal law, the facts of the case must be established beyond a reasonable doubt in court. This is a much stricter burden of proof than is required in a civil action, where the facts must be established on the balance of probabilities.

[This column is offered for information purposes, and is not to be construed as legal advice. Physicians with specific questions should contact their lawyer or the Canadian Medical Protective Association. The column is prepared with the assistance of the CMA's Department of Ethics and Legal Affairs.] ■